

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

CEDAR COVE ASSOCIATION,

Appellant,

v.

SNOHOMISH COUNTY; BIBEAX  
COMPANY, INC.; and WASHINGTON  
MUTUAL SAVINGS BANK,

Respondents.

SHB No. 88-22

ORDER GRANTING RESPONDENT'S  
MOTION FOR SUMMARY JUDGMENT

I. PROCEDURE

1. On November 13, 1987, this Board issued its Final Findings of Fact, Conclusions of Law and Order in SHB No. 87-25. The decision ordered Snohomish County to reissue, with specified conditions, a shoreline substantial development permit to Bibeaux Company for the construction of three four-plex residential units within the shoreline of Lake Stevens and associated wetlands.

2. On January 5, 1988, in response to a request from the County, the Board issued a letter of clarification of the decision.

1           3. On April 6, 1988, Snohomish County reissued the permit to  
2 Bibeaux Company.

3           4. On May 5, 1988, appellant Cedar Cove Association filed its  
4 request for review of the reissued permit.

5           5. On June 2, 1988, the Department of Ecology and the Attorney  
6 General's office certified the Request for Review pursuant to RCW  
7 90.58.180(1).

8           6. On June 21, 1988 respondents Snohomish County and Bibeaux  
9 Company, Inc. filed a Motion for Summary Judgment, together with a  
10 supporting memorandum, affidavit and exhibits.

11           7. On July 5, 1988, appellant association filed a memorandum in  
12 opposition to the motion, together with an attorney's affidavit. In  
13 the submission, appellant requested the Board to consider a letter,  
14 dated June 24, 1988, from Paddy Chamberlain, association president, as  
15 a part of the opposition to the motion.

16           8. The Board determined to decide the Motion on the written  
17 record.

## 18                           II. MATERIALS CONSIDERED

19           The following were considered by the Board upon this Motion for  
20 Summary Judgment:

21           1. Final Findings of Fact, Conclusions of Law and Order, SHB No.  
22 87-25, dated November 13, 1987.

23           2. Shorelines Hearings Board letter to parties dated January 5,  
24 1988.

25 ORDER GRANTING RESPONDENTS'  
26 MOTION FOR SUMMARY JUDGMENT  
27 SHB No. 88-22

3. Request for Review, filed May 5, 1988, with enclosures.
4. Certification of Request for Review, filed June 2, 1988.
5. Motion for Summary Judgment, filed June 21, 1988 with
  - a) Memorandum in Support of Motion for Summary Judgment
  - b) Affidavit of Larry Adamson
  - c) Exhibit 1 - Geotechnical and wetlands site evaluation
  - d) Exhibit 2 - Revised Site & Landscape Plan
  - e) Exhibit 3 - Approved Landscape & Wetland Restoration Plan
  - f) Exhibit 4 - Reissued Permit, dated April 6, 1988
  - g) Exhibit 5 - Assurance of Performance and Landscaping Bid
6. Memorandum in Opposition to Respondent Bibeaux Company's Motion for Summary Judgment, filed July 5, 1988, with
  - a) Affidavit of Gary T. Jones
  - b) Letter of Paddy Chamberlain, dated June 24, 1988
7. The prior decisions of the Board cited herein and the Snohomish County Shoreline Management Master Program (SCSMMP).

### III. UNDISPUTED FACTS

1. There are no genuine issues of material fact.
2. The following facts are undisputed:
  - a. The substantial development permit originally granted to Bibeaux Company by Snohomish County was affirmed by this Board in SHB 87-25, with the addition of conditions requiring:
    - 1) removal of fill within the associated wetlands.

1                   2) restoration of natural conditions on wetland areas  
2       which have been covered with fill, to be accomplished in conjunction  
3       with the rehabilitation plan for common open space already required.

4                   3) the creation on an undeveloped buffer between the  
5       wetland boundaries and the residential structures, with the Department  
6       of Wildlife to be consulted in regard to appropriate vegetation and  
7       maintenance for the area.

8                   b. The Board's clarifying letter, dated January 5, 1988,  
9       stated that filling should be allowed on neither Tract 999, nor the  
10      part of the wetland located on Lot 1.

11                  c. The reissued permit, dated April 6, 1988, contains the  
12      following conditions:

13                   1. No grading, filling, or other work shall take place in  
14      Tract 999.

15                   . . .

16                   4. The wetland areas of Lot 1 shall be restored as shown  
17      on approved landscape and wetland restoration plan.

18                   5. A 25' undeveloped buffer shall be established between  
19      the structures and the wetland to the north and from the lot line of  
20      Lot 1 on the east and shall be vegetated or shown on approved  
21      landscape and wetland restoration plan and other conditions of the  
22      permit.

23                   . . .

1 d. The approved Landscape and Wetland Restoration Plan shows, by  
2 cross-hatching on a drawing done to scale, the extent of existing fill  
3 material within the wetland area to be removed. The berm on the west  
4 bank of the pond is excluded from fill removal.

5 e. Larry Adamson, Senior Planner for Snohomish County, states in  
6 his affidavit:

7 I contacted the Department of Wildlife for  
8 recommendations on appropriate vegetation and  
9 maintenance for the buffer area. As with the  
10 original permit, I received no response from the  
11 Department of Wildlife, so I directed Bibeaux  
Company to prepare a landscape and restoration plan.

#### 11 IV. ISSUE PRESENTED

12 The sole issue which can be raised with respect to a reissued  
13 shorelines permit following review of a proposed development by this  
14 Board is the question of whether the reissued permit conforms with the  
15 Board's final order. SAVE v. Bothell, SHB No. 85-39 (1986).

16 The Request for Review in the instant matter (SHB 88-22) sets  
17 forth a number of assertions and issues beyond the scope of the  
18 conformity question. However, the Request does assert that the  
19 "Board's conclusions were not adequately followed in issuing new  
20 permit." We deem this sufficient to invoke the jurisdiction of the  
21 Board on the limited basis established by SAVE.

#### 22 IV. CONCLUSIONS OF LAW

23 1. Because our jurisdiction is limited to the issue of conformity  
24

1 of the reissued permit to our order, we conclude as a matter of law,  
2 that all other issues raised cannot be entertained by the Board in  
3 this proceeding. SAVE v. Bothell, SHB No. 85-39 (1986).

4 2. To the extent that appellant association is concerned with  
5 whether actual development under the reissued permit is consistent  
6 with the permit's requirements, the concerns in the first instance are  
7 matters of permit enforcement which should be addressed to the County,  
8 the Attorney General, or the Department of Ecology. See RCW  
9 90.58.140(3); RCW 90.58.210.

10 3. The Board's decision in Gillett v. Snohomish, SHB No. 87-25  
11 (1987) did not deal with activity on the wetlands which preceded the  
12 instant project of the Bibeaux company. The berm associated with the  
13 pond bank was not addressed in the findings nor included in the  
14 conditions relating to removal of fill.

15 4. The Board's decision in Gillett did not prohibit the placement  
16 of fill within the buffer area. The buffer should contain no part of  
17 the project's structures and be appropriately planted and landscaped  
18 to prevent erosion and sedimentation into the wetlands.

19 5. The letter of Paddy Chamberlain, dated June 24, 1988, does not  
20 meet the requirements for supporting affidavits by sworn statement  
21 under CR 56 and, therefore, was not considered for the purposes of  
22 examining whether material facts were at issue. The Board treated  
23 this letter as in the nature of legal argument.

1           6. The assertions of counsel for appellant in his affidavit  
2 concerning the views of Ted Mueller of the Department of Wildlife are  
3 hearsay and do not satisfy the personal knowledge criterion for  
4 affidavits under CR 56 and, therefore, were insufficient to raise an  
5 issue of material fact relating to consultation with the Department of  
6 Wildlife. Accordingly, for the purposes of this Motion, we conclude  
7 that the un rebutted affidavit of Larry Adamson shows the required  
8 consultation.

9           7. On examination of the reissued permits and the approved  
10 Landscape and Restoration Plan, incorporated therein, we conclude that  
11 the reissued permit conforms to the original order of this Board. The  
12 moving parties are entitled to judgment as a matter of law.

ORDER

The Motion for Summary Judgment filed by respondents Snohomish County and Bibeaux Company, Inc. is granted. There are no genuine issues of material fact. Respondents are entitled to judgment as a matter of law. Accordingly, the reissued shorelines permit is hereby affirmed.

DONE this 15<sup>th</sup> day of July, 1988.

SHORELINES HEARINGS BOARD

Wick Dufford  
WICK DUFFORD, Chairman

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JUDITH A. BENDOR, Member

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HAROLD S. ZIMMERMAN, Member

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